District Council 37, Local 376, 79 OCB 38 (BCB 2007)

[Decision No. B-38-2007] (IP) (Docket No. BCB-2577-06).

Summary of Decision: The Union filed an improper practice petition alleging that DEP violated NYCCBL § 12-306(a)(1) and (3) when, in retaliation for work as shop steward including but not limited to his testimony on behalf of the Union in another improper practice proceeding, the DEP wrongfully disciplined him for conduct on the job. This Board finds that certain actions by one of DEP's agents were discriminatory and retaliatory in violation of NYCCBL § 12-306(a)(3) and, derivatively, § 12-306(a)(1). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-
DISTRICT COUNCIL 37, LOCAL 376, AFSCME,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On October 12, 2006, District Council 37, Local 376 ("Union"), filed a verified improper practice petition on behalf of member Randolph Francis against the City of New York ("City") and the Department of Environmental Preservation ("department" or "DEP"). The Union alleges that DEP violated § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") when, in retaliation for assisting other Union members as shop steward and, in particular, testifying on behalf of one member in an

improper practice proceeding before the Office of Collective Bargaining ("OCB"), DEP supervisors served Francis with disciplinary charges falsely alleging that Francis violated the DEP Uniform Code of Discipline ("disciplinary code") in an altercation with a supervisor. The City argues that DEP's actions were warranted and were not violative of the NYCCBL. After a hearing, this Board finds that certain actions by DEP were discriminatory and retaliatory in violation of NYCCBL § 12-306(a)(3) and, derivatively, § 12-306(a)(1) and we grant the petition.

BACKGROUND

After two days of hearings in this matter, the Trial Examiner found that the totality of the record established the relevant facts to be as follows.

Randolph Francis has been employed by DEP since August 1988, first as an apprentice construction laborer for two years and subsequently as a construction laborer. Beginning in 1990, he was and continues to be assigned to the Brooklyn Maintenance Yard located at 22 North 15th Street in Brooklyn ("yard"). He is assigned to investigate water leaks and water main breaks. He was elected Union shop steward for the yard in 2003.

Robert West is responsible for supervising construction laborers at the yard including Francis. His title is foreman but he is referred to by the office title of "supervisor." As a supervisor, West has known Francis since 2001. They have had and continue to have a friendly working relationship, often conversing without rancor about history, politics, and other non-work-related subjects. West has occasionally spoken with Francis about issues which West himself had with his own supervisors, with Francis telling him that West needed to speak with his own union about those issues. (Tr. 14–15, 24.) West reports directly to Daniel Bollaert, the District Supervisor who, in turn,

oversees all supervisors and water maintenance laborers in Brooklyn. Bollaert's direct supervisor is Louis DiMeglia, Borough Superintendent, who oversees the work of some 50 employees including supervisors and laborers. He is not stationed at the yard but daily visits that location as well as DEP head offices at Lefrak City ("Lefrak").

On October 12, 2005, Francis testified against DEPat an evidentiary hearing held at OCB in an improper practice proceeding filed by the Union on behalf of another Union member. The Board of Collective Bargaining ("Board") issued a final determination in that proceeding on April 4, 2006, finding that DEP committed an improper practice when DiMeglia retaliated against a probationary Union member for seeking assistance of the Union with respect to time and leave issues. *Local 376, District Council* 37, Decision No. B-12-2006. In the instant matter West testified that he was unaware of the specific allegations in that case and of the Board's findings on which the determination was based and the Union presented no evidence to contradict West's assertion. (Tr. 47-48.)

Francis testified that beginning in April 2006, the same month that the Board issued the decision, he experienced a change in West's conduct towards him. Whereas before April 2006, the camaraderie was "very close," Francis stated that all that changed. Referring to West, Francis said that, when he would talk with Union President Gene DeMartino:

> he would look at me, interrupt my conversation, "I want you to get off the phone," things like that, rush me out of the yard when other people have complaints, and I know who was behind it, it wasn't really him, but I already knew who was behind it . . . He would, like, if I be talking to one of the co-workers, he would interrupt and say, "I want you to go in the field, I want this done right away. You have en emergency job," and the job wasn't an emergency. He would say, "You have to get out in the yard," you know, things like that, when I be talking to any of the co-workers.

(Tr. 15.) West, in his testimony, did not contradict this statement by Francis.

Francis and West worked on Sunday, June 25, 2006. Francis arrived at the yard to start his shift which began at 7:30 a.m. When he arrived, two workers came to him with a complaint about a demand by management to do more work, specifically to "clean more sewers." (Tr. 16.) As Francis was responding to their complaint, he testified that West came along and "told the two gentlemen to move on." (Tr. 16.) Francis testified:

> I asked him, I said, "You see me talking to these men. They have a right to talk to me as a shop steward." He says, "I want you out on the job, in the truck and out of the yard now."

(Tr. 16.)

Francis testified that the two workers who had approached Francis "went about their business" and that he "discussed the matter" with West. (Tr. 17.) West did not recall having any conversation with Francis at that time. (Tr. 42.) Francis testified that after West broke up the discussion, Francis then entered his truck, moved it to the fueling station, and returned it to the Yard to "bring the gas book in," at which time he hit a "pole in the yard."

West testified hearing a noise, he went to investigate, and saw that the truck had hit a "stanchion." (Tr. 17, 43.) West said "minimal damage" resulted, with the truck bed lever slightly bent and "a bit of paint" on the truck but nothing extensive. (Tr. 43.) West did not take photographs of the condition of the truck. (Tr. 55.) He asked Francis if he thought an accident report needed to be written about it. West testified that at that point "we got into a little heated discussion." (Tr. 43.) West described the alleged altercation as follows:

> A. Mr. Francis stated, "I'm tired of you following me around. You better knock this off,' to that effect, you know, that's not verbatim, but he then told me, 'You know

> what? Fuck you." I said, "What did you say?" He said it again. And then a third time he said, "Fuck you, you cocksucker." And that was basically the incident."
> Q. And what did you say in response?
> A. I said, "Are you sure you want to say this? I'm going to wind up writing you up." I got a third one, a third "Fuck you," and that was it.
> Q. And then where did you go after that?
> A. From there I walked away and that was about it. That was about all of it.

(Tr. 43–44.)

The Union generally denies the allegation and Francis testified that there was no conversation with West after they looked at the truck.

> A. He came over and looked, and I can't remember what he said, and I told him there was no damage, because I jumped out the truck and there was no damage on the truck.
> Q. Was there any conversation beyond that?
> A. I can't recall. I think he did say something to me, but I can't recall.

(Tr.17-18.)

On Monday, June 26, DiMeglia learned from Supervisor Larry Gallina about the exchange between Francis and West. (Tr. 88, 91.) Gallina had not personally witnessed the exchange. (Tr. 92.) Francis testified that he learned from Bollaert on that date that he would be brought up on charges of violating the disciplinary code for failure to file a written report about the truck and for cursing at West. (Tr. 18.) Francis told Bollaert that the charges of cursing and damaging the truck were "all a lie." (Tr. 18.) Francis took Bollaert to see the truck:

> I say, "Do you see anything wrong with this vehicle?" He said, "I see a yellow mark." I said, "Where's the yellow mark?" There was no yellow mark. And then somehow he left the room. I asked him for an accident report. Louie DiMeglia was sitting there. So I says to Louie [DiMeglia] – I was going to give the accident report – I put on an accident report, "no damage," right across the accident report, "no damage." I was going to give it to Louie. Louie said, "No, don't give it to me; give it to Danny [Bollaert]." So I left it on Danny's desk.

(Tr. 19–20.)

On Tuesday, June 27, DiMeglia heard West describe the events to Bollaert. (Tr. 89.) DiMeglia told West that if he wished to press charges against Francis, Bollaert would provide West with the "disciplinary data sheet" to start the process. According to Bollaert, disciplinary data sheets as well as incident/accident report forms are kept in Bollaert's locked office when he is not there on weekends. DiMeglia testified that his contribution to the discussion between West and Bollaert was minimal:

> A. The only question I asked him was the same question that Mr. Bollaert asked, it was if he wanted to follow through with the charges, if he felt strongly enough that this was an insubordinate act or whatever the case may be, being cursed out, if he felt strongly enough about it, then, you know, if he wanted to write charges that I would, you know, do whatever I had to do to back him up on it or, you know, deliver the charges to Lefrak.
> Q. Did you recommend to him that he go forward with it?
> A. No, I did not.
> Q. Did you tell him if what he said was true, that he should go forward with it?
> A. I did not witness it. If he felt – I asked him, again, I only asked him one time, if he felt strongly enough that that happened and he wanted to follow through with charges, then that's what he should do.
> Q. Okay. What did Mr. West say to you?
> A. He told me he would fill out the disciplinary sheet
> Q. Who gave him the disciplinary sheet?
> A. Mr. Bollaert.
> Q. And did Mr. West fill it out in front of you?
> A. No, he did not.
> Q. Did you see him fill it out?
> A. No, I did not.
> Q. Did you see him return the form?
> A. No, I did not.
> Q. Did you ever see the form after he wrote it?
> A. Yes, I did.
> Q. When did you see it?
> A. The next day, the next morning, Mr. Bollaert handed it to me and it was on my desk when I came in.
> Q. And what did Mr. Bollaert say?

A. Nothing, just handed it to me and I read it.
Q. And that was on Wednesday, June 28th?
A. Yes.
Q. And you read it and you did what?
A. I read it and it said "forward to superior," I'm supposed to write my name there, so that's why I printed my name in there and I brought it to Lefrak.

(Tr. 92–94.)

West testified that it was he who completed the disciplinary data sheet in its entirety except for DiMeglia's signature and date at the bottom of the sheet, which were added by DiMeglia. (Tr. 52, 95.) The sheet stated, in pertinent part:

> I asked the driver Mr. R. Fra[n]cis if there was any damage. Mr. Francis then began his tirade. He proceeded to tell me he was tired of my walking around the yard and told me three times "fuck you"[;] he then called me a "cocksucker" and I was a bitch who was afraid of Lou D[i]M[e]glio. He then told me if I didn't watch myself he would have the union on me and I will be in a lot of trouble. Mr. Francis has been very confrontational in recent weeks and been hostile toward any form of authority. I resent Mr. Francis's threat and his abusive language. I also noticed yellow paint on the dump bed and release handle. Mr. Francis did not fill out an incident report. . . .

(Ans. Ex. 4.)

The DEP disciplinary code states, at Rule E(41), that employees using or operating City or DEP vehicles or equipment "shall promptly make a written report, upon the appropriate form, of any defective condition thereof or any accidents thereof or causes thereby." In addition, the disciplinary code states, at Rule E(6), that employees "shall not conduct themselves in a manner prejudicial to good order and discipline."

Bollaert testified that it was either the following Tuesday or Wednesday when he spoke with Francis about the truck mishap and gave Francis the form to fill out to record the matter. (Tr. 82.) West testified that Francis did submit the report within days of the event, although West said that

he had not requested or required Francis to submit it. (Tr. 58–59.) Bollaert, however, stated, "We would like them filled out, yes." (Tr. 74.)

In his disciplinary report, West described Francis as "confrontational in recent weeks" when West sought to perform his routine inspection of Francis' work, but under oath, West downplayed his characterization of Francis' conduct. West testified that Francis "didn't really become verbal about it," that the resentment was only "slight," that "it just didn't manifest itself overtly with any statements or anything," and that "[i]t was just a mood that was between us, and he [Francis] really didn't say anything until the day of the truck incident." (Tr. 51, 53–54.)

The jobs where West said Francis took issue about the oversight included one in which Francis sought to have a repair crew shut the tap on a vacant building but West was able to get the realtor handling the sale of the building to enter and close it off from the inside, obviating the repair crew. (Tr. 67.) The other "incidents," as West described them, "were just things that are not anything drastic, not anything that is really worth citing." (Tr. 67.) He continued, "it's just a feeling that we had. And I don't say that he didn't try to do his work. He does try to do his work, but as a supervisor I have to follow up on someone's work as well." (Tr. 67-68.)

Bollaert also testified that, before the incident, he had never received a complaint from a subordinate supervisor about Francis or any laborer. (Tr. 72, 80.) Bollaert added that, while profanity was not "common" around the yard, it was not unheard of. (Tr. 81.) Francis testified that in one instance, a laborer told a supervisor that he was going to "take the guy's head off" for giving him a particular assignment. Francis stated that charges against that laborer for making the threat were ultimately dropped at DiMeglia's direction. (Tr. 21–22.)

With respect to the charges against Francis, DiMeglia testified that he neither recommended

that any specific charges be levied against Francis, nor did he provide any cover letter or memo with the form, nor did he engage in extended discussion with his supervisor, the deputy chief, other than to explain what happened, nor did he talk with any other member of DEP's executive staff or have anything to do with the case after he spoke briefly with the deputy chief. (Tr. 95–97.) DiMeglia testified that he did sign the disciplinary data sheet against Francis as opposed to having Bollaert sign it, and when asked under cross-examination why DiMeglia signed it rather than Bollaert, DiMeglia responded, "I have no idea." (Tr. 95.) DiMeglia also stated that he brought the signed sheet to the DEP head office at Lefrak, where he explained to his supervisor, deputy chief Delaney, ". . . what happened, what was on [the sheet]." (Tr. 95-96.)

The City asserts that, on or about June 27, 2006, DEP's acting deputy commissioner of the bureau of water and sewer operations forwarded the deputy chief's formal complaint to the DEP's disciplinary counsel with a memo requesting that she take action. On or about July 27, 2006, the DEP served Francis with a Notice and Statement of Charges for violation of Rules E(6) and E(41) of the disciplinary code. On August 16, 2006, an Informal Conference was held, and in her Notice of Determination of that same date, the Conference Holder recommended a five-day suspension without pay as the penalty. The Union is appealing the suspension in arbitration. No hearing in that matter has yet been scheduled.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that, in retaliation for Francis' testimony in another improper practice proceeding and other conduct as shop steward, Francis was charged with violating the DEP

disciplinary code by using profanity towards a supervisor, which he denies, resulting in the imposition of a five-day suspension. The Union asserts that the profanity claim allegedly followed an incident with his supervisor after a minor accident on the job for which the City contends he was required to file a report, a report which the Union contends he did file but one which it asserts was not actually required to be filed.

The Union contends that the retaliation resulted from supervisors' knowledge of Francis' union activity and from their anti-union animus. The Union cites one supervisor in particular, whom this Board found, in the earlier improper practice proceeding to have engaged in anti-union animus, and against whom Francis testified in that earlier proceeding.

The Union contends that this anti-union animus was demonstrated by a change from what had generally been cordial behavior on the part of Francis' immediate supervisor to that supervisor's alleged attempts to stifle Francis' involvement in discussions with other workers about Union-related matters. The Union contends that the animus was demonstrated also by the fact that the supervisor's immediate superior was not the person to whom the charges were referred but instead the borough superintendent personally delivered the charges to the DEP's home office. The borough superintendent was the same individual whom this Board found to have engaged in retaliatory discrimination in the earlier proceeding in which Francis had testified. The Union alleges that the animus displayed by DEP warrants a finding by this Board that DEP's decision to bring disciplinary charges against Francis violated NYCCBL § 12-306(a)(1) and (3).[1]

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[1] NYCCBL § 12-306(a) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *

The Union maintains that DEP's contention that its actions were justified is pretextual. The Union points to the testimony of West, Francis' immediate supervisor. In contrast to West's statement on the disciplinary data sheet of June 27 that Francis had been confrontational and hostile toward authority, West testified that Francis was not verbal about it at all. Although West testified that Francis was slightly hostile towards West's investigation of his work, he testified that, until the incident with the truck, Francis did not express any hostility, rather that West discerned hostility from what he described as "a mood between us." Further, West stated that the "mood" became manifest by Francis' "demeanor" a couple of weeks earlier but not through any confrontation up until the truck incident. West chose not to write up Francis for this perceived hostility.

Also supporting its contention that the DEP's actions were pretextual, the Union points to the testimony of Bollaert who stated that, in the six months that he had held the position of district supervisor, he had never before brought up a laborer on disciplinary charges. He also testified that, at least up until the filing of the instant petition, no one else had been brought up after that time either.

The Union contends that DiMeglia played a key role in bringing the charges against Francis even though DiMeglia was not Francis' immediate supervisor and was not involved in the truck matter underlying the charges. The Union charges flatly that DEP would not have brought these charges against Francis if he had not been a shop steward and had not testified on behalf of the

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> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization. . . .
>
> NYCCBL § 12-305 provides, in relevant part:
> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

Union in the improper practice proceeding in October 2005 on behalf of a fellow Union member, a proceeding which found DiMeglia guilty of having violated the NYCCBL. The Union contends that DiMeglia was responsible for the animus that filtered down to the yard. The Union contends that "several times," West would "rush" Francis onto his truck, interrupting discussions Francis was having with Union members who wanted to discuss complaints from Union members. (Tr. 100.) The Union contends that DiMeglia was also responsible for the environment that resulted in disciplinary charges against Francis. The Union points to DiMeglia's testimony that he told West that "if he felt strongly enough that that happened and he wanted to follow through with charges, then that's what he should do." (Tr. 93.) DiMeglia testified that West filled out the disciplinary sheet, gave it to Bollaert in turn, who, rather than signing it, and gave it to DiMeglia to sign for reasons DiMeglia could not explain. The Union contends that the charges against Francis were so important to DiMeglia that DiMeglia brought it personally to the office of his supervisor, the deputy chief of the department, and waited for the deputy chief to arrive in order to explain the charges.

City's Position

The City argues that the Union has failed to demonstrate any causal connection between DEP's discipline of Francis and either Francis' role as Union shop steward or his testimony in an earlier improper practice proceeding which found against the department. Even if the Board were to find such a connection, DEP had a legitimate business reason for disciplining Francis for insubordination shown to his supervisor.

Addressing the Union's assertion that West interrupted Francis while listening to co-worker grievances on June 25, the City contends that this claim is unsupported in the record. No evidence was presented that West was aware that Francis was discussing work-related grievances with his co-

workers when West directed Francis to his daily field assignment. The Union failed to corroborate Francis' testimony and failed to cross-examine West on this issue.

Addressing the Union's claims that West brought charges against Francis as a result of retaliation for Francis' testimony in an earlier improper practice proceeding that resulted in a finding against the department, the City contends that this claim also is unsupported in the record. Not only was Francis' testimony in that case virtually one year earlier too remote in time to establish a causal connection to the discipline at issue in the instant case, but West had no involvement in that proceeding and had no knowledge of the role Francis played in it. West testified that he "had heard that there was some type of charge brought up," but he testified that he was "not really familiar with anything" beyond "hearsay in the office." (Tr. 48.) Francis, the Union's only witness, failed to testify with respect to any conversation he may have had with West on that case, nor did Francis claim that he had ever heard that West was aware of either the allegations, Francis' testimony, or the Board's decision in the case. To the contrary, Francis testified that he and West continued to enjoy a positive working relationship for months following Francis' testimony and also that West had on occasion even approached Francis with his own issues involving DiMeglia. (Tr. 12–15.) The Union failed to present any evidence to explain its allegation about why West would retaliate against Francis for his earlier testimony even if West had been aware of it.

To the Union's claim that animus was shown by the fact that Bollaert was not the person to whom the charges were referred but instead DiMeglia personally delivered the charges to the DEP's head office, the City proffers the testimony of DiMeglia and Bollaert that DiMeglia's involvement was limited to receiving the completed disciplinary data sheet from Bollaert and forwarding it to the deputy chief for action. The City points to the Union's own admission that "DiMeglia was not

Francis' supervisor and was not involved in the alleged incident underlying the charges." (Petition ¶ 5.)

As for the claim that the DEP's action was pretextual, the City contends that DEP routinely disciplines employees for engaging in insubordinate conduct when supervisors are verbally attacked. Francis' verbal attack immediately following the incident in which his truck made contact with a stanchion in the yard violated the disciplinary code and his supervisors acted reasonably by serving disciplinary charges for the attack which Francis denies but the City's witnesses contend occurred. The City further contends that other employees have been disciplined for displaying disrespectful conduct towards their supervisors.

The City argues that Union has simply failed to support its allegations with probative evidence that any conduct of which the Union complains was motivated by anti-union animus. Even if the Board were to find a *prima facie* case and evidence to support the claims, the City argues that DEP had a legitimate business reason to bring the disciplinary charges against Francis and that no evidence has been offered to demonstrate that the reason was in any way pretextual.

DISCUSSION

The issue in this case is whether the Union has established that DEP retaliated against Francis for his activities as Union shop steward including, but not limited to, his testimony in another improper practice proceeding brought by the Union. This Board finds that the Union presented credible evidence sufficient to establish a *prima facie* claim of retaliation by DEP for Francis' protected activity, in violation of NYCCBL § 12-306(a)(1) and (3). We also find that while the evidence adduced by the City was sufficient to rebut the *prima facie* showing as to DEP supervisor

West, the record shows that the business reason proffered by the City for the actions of superintendent DiMeglia is pretextual. Accordingly, for the following reasons we will grant the Union's petition.

Pursuant to NYCCBL § 12-306(a)(1), it is an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. . . ." In addition, NYCCBL § 12-306(a)(3) provides that it is an improper practice for a public employer to "discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization . . . ." *Fabbricante*, Decision No. B-30-2003 at 30. The filing of grievances is considered protected activity under the NYCCBL. *Fabbricante*, Decision No. B-30-2003 at 27; *Doctors Council*, Decision No. B-12-97 at 10.

In determining if an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, Decision No. B-51-87 at 18. To establish a claim under this test, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a motivating factor in the employer's decision.

Collella, Decision B-27-2007 at 53; *quoting Bowman*, Decision No. B-51-87 at 18-19; *see also Fabbricante*, Decision No. B-30-2003 at 30-31 (citing additional cases).

If a petitioner alleges sufficient facts concerning these two elements to make out a *prima facie* case, the employer "may attempt to refute the petitioner's showing on one or both elements or demonstrate that legitimate business motives would have caused the employer to take the action

complained of even in the absence of protected conduct." *Howe*, Decision B-19-2007 at 11, *citing Local 237, City Employees Union,* Decision No. B-24-2006 at 18-19.

In the instant case, the Union contends that, pursuant to the performance of Union activity, Shop Steward Francis was subjected to discriminatory and retaliatory disciplinary action. Francis testified as to that allegation. The City does not deny that Francis was, at the time relevant here, and continues to be, shop steward for the construction laborers at the yard. The City also does not deny that, from time to time, Francis spoke with unit members about terms and conditions of employment. Significantly, it is undisputed that Francis testified on behalf of the Union in an earlier improper practice proceeding, which resulted in a finding that DEP, by the actions of its agent Louis DiMeglia, committed an improper practice. *See Local 376, District Council 37*, Decision No. B-12-2006. Finally, the City's witnesses, West, Bollaert and DiMeglia, did not deny that Francis was active in the Union. Thus, we find that the Union has established the first prong of the *Bowman-Salamanca* test. *See, e.g., Howe*, Decision B-32-2006 at 21.

With respect to the second element of the test, a petitioner must demonstrate a causal connection between the protected activity and the motivation behind management's actions which are the subject of the complaint. *Local 376, D.C. 37*, Decision No B-15-2004 at 14. Proof of the second element must necessarily be circumstantial absent an outright admission. *City Employees Union, Local 237,* Decision No. B-13-2001 at 9. We have held that in offering evidence on this issue,

> the petitioner may attempt to carry its burden of proof as to the causation prong of the *Salamanca* test by deploying evidence of proximity in time, together with other relevant evidence.

Collella, Decision B-27-2007 at 54, *citing Communication Workers of Am., Local 1180*, Decision

No. B-20-2006 at 14.

The management actions of which the Union complains in this case consist of the following: (1) the submission of a written departmental complaint about (i) Francis' alleged profanity towards West following an incident with Francis' work vehicle and (ii) Francis' alleged failure to submit a written report about the incident with the vehicle, and (2) the actions of DiMeglia in the manner in which he processed the complaint. The veracity of the DEP's charges against Francis is not at issue in this improper practice proceeding. What is at issue here is whether the bringing of charges against Francis by his supervisors, resulted from anti-union animus towards Francis for his involvement in Union activity.[2]

The Union contends that anti-union animus was demonstrated by a change from West's generally cordial conduct towards Francis to West's increasingly visible discontent with Francis' discussions with other Union members on the job. Francis testified credibly that West's verbal admonitions to him against talking with other Union members on the job increased the same month that this Board issued its determination in the proceeding at which Francis testified against the DEP. Francis testified, and West corroborated, that prior to that, their conversation was routinely amiable. West testified credibly that, at about that time, Francis became increasingly discontent with West's oversight on the job. The concurrence of both witnesses' credible testimony as to their respective perceptions leads us to conclude that an event in April 2006 wrought the change in attitude towards each other. The preponderance of the evidence points to the issuance of the Board's decision in *Local 376, District Council 37*, Decision No. B-12-2006, as the precipitating event in West's

[2] The Union states no specific claim of retaliation by Bollaert, merely pointing to his role in conveying West's disciplinary report to DiMeglia; thus, we will focus our analysis on the actions of West and DiMeglia.

changed manner of oversight of Francis.

As to DiMeglia, the Union contends that his anti-union animus which the Board found in *Local 376, District Council 37*, Decision No. B-12-2006, was the motivation for his actions in the case currently before us. The Union points to several factors in the record indicating continuing animus against the Union in general and Francis in particular.

First, the Union points to DiMeglia's intervention between West and Bollaert, West's immediate superior, in the Francis matter. DiMeglia told West that if he "felt strongly" about it, West could submit a report to either Bollaert or to DiMeglia himself and that DiMeglia would forward it personally to the head office and "do whatever [he] had to do to back him up on it." (Tr. 89, 92-93.) West responded that he would do it. (Tr. 93.)

The Union further asserts that the disciplinary action pursued against Francis underscores its argument that DiMeglia continued to harbor animus against Francis for the latter's testimony in the earlier improper practice proceeding. Francis testified that "people use profanity towards foremen" in the yard but are not usually written up for it. (Tr. 23.) He further testified that, two months after the filing of the instant petition, when another construction laborer argued with a supervisor over an assignment and threatened to "take the guy's head off," DiMeglia dropped the charges relating to the threat. (Tr. 21–23.) Francis' testimony was not contradicted by the City's witnesses or any documentation admitted into evidence. In spite of the profanity that Bollaert had heard in the yard before the incident for which Francis was charged, Bollaert testified that no subordinate supervisor had filed a disciplinary form with him in his capacity as district foreman over the use of profanity. (Tr. 81.) In its post-hearing brief, the City contends that other individuals have been suspended for using similar language towards a supervisor but the City presented no testimony or documentary

evidence to that effect. Thus, we find that the evidence supports the Union's claim of a disparity in the DEP's disciplinary process as it pertains to Francis in this case, one which raises a suspicion of animus. Based on all of the above evidence, we find that the Union satisfied its burden of establishing a *prima facie* case that DEP's actions were improperly motivated and constituted a violation of NYCCBL § 12-306(a)(1) and (3).

The City attempted to rebut the Union's showing as to both West and DiMeglia. West testified credibly that it was his decision to write up the disciplinary report concerning the June 25, 2006 incident. He described how "a mood that was between us" had developed, but Francis "really didn't say anything until the day of the truck incident." (Tr. 51, 53–54.) We find that the evidence does not support a conclusion that West's decision to file the disciplinary complaint against Francis was motivated by anti-union animus. Neither documentary evidence nor testimony have been presented which provide a sufficient link between Francis' activities on behalf of the Union and West's own decision to file the complaint about Francis' asserted profanity and alleged failure to file a report on the truck incident. While it may be argued that West would not have wanted to contravene his supervisor, DiMeglia's suggestion, the record provides insufficient support for this Board to draw that conclusion. Thus, we find that if West's attitude towards Francis changed in April 2006, that change was not the motivating factor in West's decision to initiate discipline against Francis. On this record, we find that the City has rebutted the Union's claim concerning West's bringing of charges and we find that his actions were not violative of the NYCCBL.

Addressing the Union's claim that DiMeglia was responsible for a disparity of disciplinary treatment of Francis at least at the higher levels of supervisory authority, the City argues that DiMeglia was not Francis' direct supervisor, therefore, could not be held responsible for any

disciplinary action against him regardless of whether it was motivated by anti-union animus. We find the City's argument to be disingenuous because of DiMeglia's active role in processing the disciplinary charges. DiMeglia was asked but could provide no reason as to why he took it upon himself to sign the disciplinary sheet, rather than having Bollaert, who was West's immediate superior, sign it. (Tr. 95.) In addition, DiMeglia testified that he personally delivered the disciplinary data sheet to the deputy chief at DEP's head office. The deputy chief was not in his office when DiMeglia arrived, but rather than deposit the document with a person of suitable discretion, DiMeglia waited for the deputy chief to return. Further, DiMeglia testified that when the deputy chief returned, he explained to him ". . . what happened, what was on [the document]." (Tr. 95-96). No testimony was presented as to any custom or protocol requiring a supervisor of DiMeglia's level of authority to deliver such a document in person. DiMeglia's decision to deliver the document personally to his superior and to wait to discuss it with him suggests that he was motivated by a reason beyond a mere sense of responsibility that the document fall into the right hands.

The record shows that Francis was no ordinary laborer. He was a shop steward and counseled other laborers with respect to employment issues vis-a-vis management. He himself had testified in the prior improper practice proceeding in which this Board found DiMeglia to have engaged in conduct violative of the NYCCBL. That finding was made public only a matter of weeks before the incident in which Francis was involved and for which he was about to be disciplined, due in part to DiMeglia's actions. There is no dispute that West drafted the disciplinary data sheet at the outset. There is no question that Bollaert took the sheet from West and gave it to DiMeglia. Whether either of those supervisors was motivated to act as a result of any implicit urging on

DiMeglia's part, as we have said, the record does not show. But DiMeglia was the individual who had the power to drop the charges against Francis if he so chose, as he did when another laborer threatened a supervisor – not with name-calling but with actual threat of physical injury. We find that while DiMeglia was not immediately involved in the incident underlying the charges against Francis, he was involved in the decision to pursue those charges, in contrast to charges of a more serious nature against a different laborer which DiMeglia dropped. While, in the abstract, the violation of the disciplinary code with respect to the use of profanity might be cause for disciplinary action, the record, here, shows that that is not always the result. Bollaert testified that profanity, though not common, is sometimes heard in the yard (Tr. 81), and yet before the incident with Francis he had not received a single complaint about any laborer. (Tr. 72, 80.). Thus, we find DiMeglia's role in pursuing the charges against Francis for use of profanity without a consistent explanation to be discriminatory and retaliatory for Francis' union activities.

Regardless of any such motivation, the City contends that the DEP had a legitimate business reason to pursue charges against Francis. However, when a public employer offers, as a legitimate business defense, a reason that is unsupported by or inconsistent with the record, the defense will not be credited by this Board. *Patrolmen's Benevolent Ass'n,* Decision No. B-25-2003 at 13; *Local 1182, Communications Workers of America*. Decision No. B-26-96 at 23. The City's proffered legitimate business reasons for disciplining Francis rest in large part upon the credibility of DiMeglia's testimony that he was merely forwarding a document from subordinate supervisors to the agency's disciplinary process. It is true that he was not Francis' immediate supervisor, and he contended that he had not influenced either West or Bollaert to file the charges although he told West that, if West felt strongly enough about the alleged act of insubordination to write up Francis, that

he, DiMeglia, would "do whatever I had to do to back him up on it." No testimony was presented in which DiMeglia alleged that he had any personal knowledge of the facts underlying the incident. We find that it simply is not credible that, without inquiring further, a supervisor of DiMeglia's ranking would "do whatever [DiMeglia] had to do" to support disciplinary action which would result in the five-day suspension without pay of a longtime employee, particularly one holding a role in departmental labor relations that was not insignificant. Further inquiry might have resulted in the same outcome, but DiMeglia failed even to inquire of West or Bollaert.

The credibility of DiMeglia's testimony as to his role in the disciplinary process is further undermined by his failure to explain why he, not Bollaert, signed the disciplinary data sheet and why DiMeglia decided to hand-deliver the sheet to the deputy chief rather than simply deliver it to the deputy chief's office. In sum, DiMeglia's testimony presents inconsistencies that strain the credibility of his testimony. In addition, Bollaert's testimony that Francis did file his report on the truck mishap the very day Bollaert provided him with the paperwork to record it further undermines the credibility of DiMeglia's claim that the disciplinary charges were warranted and not related to Francis' union activities.

Thus, we find the business reasons offered to explain DiMeglia's actions with respect to Francis are not legitimate but instead pretextual and, therefore, unlawful under the NYCCBL. *See City Employee's Union Local 237*, Decision B-3-2006 at 15. Where, as here, "a petitioner has established a credible *prima facie* case and there is sufficient evidence to find that the employer's asserted justification is false, we may conclude that the employer engaged in unlawful activity." *Collella*, Decision B-27-2007 at 61; *quoting Soc. Servs. Employees Union, Local 371*, Decision No. B-35-2006 at 20; *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147-148 (2000).

Therefore we hold that the disciplinary actions which DiMeglia took against Francis in the instant proceeding were retaliatory in violation of NYCCBL § 12-306(a)(3) and, derivatively, of § 12-306(a)(1) as well. NYCCBL § 12-306(a)(1) states that it is unlawful for a public employer "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter." *Sergeants Benevolent Ass'n*, Decision No. B-22-2005 at 19. We find that DiMeglia's animus against Francis' union activity to be sufficiently coercive as to discourage and inhibit other Union members from calling on their representatives to assist in the same way that Union members have sought Francis' assistance for their work-related issues, and thus, violative of NYCCBL § 12-306(a)(1).

For these reasons, we grant the instant petition to the extent it relates to the actions of DiMeglia and direct DEP and its agents, including specifically Louis DiMeglia, to cease and desist from retaliating against Francis on the basis of his protected union activity. Since the City has failed to show that the disciplinary charges against Francis would have been further processed and the penalty of suspension imposed without DiMeglia's improperly-motivated actions, we will further direct DEP to rescind the five-day suspension at issue herein and to expunge Francis' personnel files of any reference to the suspension at issue.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by Local 376, District Council 37, against the City of New York and the Department of Environmental Protection, docketed as BCB-2577-06, is granted; and it is further

DIRECTED, that the Department of Environmental Protection and its agents, including specifically Louis DiMeglia, cease and desist from retaliating against Randolph Francis on the basis of his protected union activities as described herein; and it is further

DIRECTED, that the Department of Environmental Protection rescind the five-day suspension at issue herein and reimburse any monies taken from Francis on account of said suspension; and it is further

DIRECTED, that the Department of Environmental Protection expunge Francis' personnel files of any reference to the suspension.

Dated: December 4, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER